

Exhibit D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

- - - - -

VITA-MIX CORPORATION,)
)
Plaintiff,) Case No.
) 1:06-CV-02622-PAG
-v-) Judge Patricia A.
) Gaughan
BACK TO BASICS)
PRODUCTS, INC., ET AL.,)
) (Subject to
Defendants.) Protective Order.)

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VIDEOTAPED DEPOSITION OF MAJID RASHIDI,
Ph.D., P.E.
Friday, January 25, 2008

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Videotaped deposition of MAJID RASHIDI,
Ph.D., P.E., called by the Plaintiff for
examination under the Federal Rules of Civil
Procedure, taken before me, Carla A. Virgili,
Registered Professional Reporter, Certified
Realtime Reporter, Notary Public in and for
the State of Ohio, at the offices of McDonald
Hopkins Co., LPA, 600 Superior Avenue, East,
Suite 2100, Cleveland, Ohio 44114, commencing
at 9:00 a.m., the day and date above set
forth.

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CORSILLO & GRANDILLO
COURT REPORTERS
700 City Club Building
Cleveland, Ohio 44114

1 MR. AYCOCK: Objection.

2 Lacks foundation.

3 A As I said, my very first tests that I
4 asked to do and I did it myself in Calfee was
5 to just observe the behavior of the Vita-Mix
6 blender when I put pure water in it. So I
7 was kind of on the big picture just to see
8 how the fluid is turned around because when
9 you have a pitcher which is a square cross-
10 section versus a pitcher that is round in
11 cross-section, many other things can happen.

12 Some of the shortcomings of the '021
13 patent is this: They only talk about two
14 very simplistic matters and they are silent
15 about many other important issues. So I was
16 just trying to demonstrate that if you change
17 the RPM, the channel changes; if you have a
18 round pitcher versus square pitcher in cross-
19 section, things are different. So I was on a
20 very preliminary domain or stage.

21 So I did not make any thick smoothie or
22 anything up to March 14th so it was just pure
23 water to demonstrate that the air channel --
24 one of the most important factors is the RPM
25 of the blade. I was just demonstrating --

1 because I concentrated -- with all due
2 respect, Mr. Robert Aycock is not a physicist
3 or engineer so I was demonstrating to him
4 that when you read these patents, don't get
5 tangled with the legal language. Just look
6 at the RPM. Look at -- if you increase the
7 RPM, the channel grows; if you have very low
8 RPM, the channel's just a little dip and it
9 never gets to the blade. So RPM is one of
10 the most important factors in the definition
11 of the size of the channel and blah, blah.
12 So I was kind of at this very preliminary
13 stage.

14 Q So therefore, if there is a blender or
15 a mixer of any kind in the small appliance
16 area, in the kitchen blender area, it doesn't
17 have sufficient RPM, is it your opinion that
18 such a mixer or blender has no bearing with
19 respect to the Vita-Mix '021 patent?

20 MR. AYCOCK: Objection.

21 Form, lacks foundation.

22 A All I'm saying is RPM is a parameter in
23 defining the air channel, that's all I'm
24 saying, one of the parameters which defines
25 the air channel. Low RPM, very small or very

1 shallow channel; higher RPM, more agitation,
2 more pumping action. So this is a very
3 trivial type of matter to me and I was trying
4 to explain these things to Mr. Robert Aycock
5 and if Mr. Clint Duke was there, to him as
6 well.

7 Q Up to the point of the meetings through
8 March 14th, 2007, did you ever operate, up to
9 that point, a Back To Basics blender or
10 smoothie maker?

11 A I don't recollect. That's also
12 something that I don't recall whether I have
13 done it or not.

14 Q You were able to conclude
15 noninfringement even though you never tested
16 a Back To Basics smoothie maker or blender up
17 to that point?

18 A As I said, I was not kind of -- see, I
19 didn't start working toward noninfringement.
20 One thing that I told Mr. Robert Aycock was
21 that I have to look at the device of Vita-Mix
22 and my very first attempt was to see if the
23 device of Vita-Mix works as it promises or as
24 the teaching of the patent goes and then I
25 started with that and then I started working

1 say that certain things that were
2 communicated between the inventor of Vita-Mix
3 and the patent examiner was kind of not
4 discussed very clearly. That's why the
5 patent examiner allowed them a very narrow
6 band of, kind of, claim and after that claim
7 was allowed as a method claim, it is my
8 understanding that Vita-Mix is trying to, on
9 their own, expand the scope of the claim.

10 Q Do you agree with me that the Back to
11 Basics Defendants must prove invalidity by
12 even a higher standard if the Patent and
13 Trademark Office considered the prior art
14 that you're considering during the
15 prosecution of the Vita-Mix '021 patent?

16 MR. AYCOCK: Objection.

17 Calls for a legal conclusion.

18 A As I said, one of the patents that I'm
19 using as a prior art that the patent examiner
20 has seen is that of Jacobsen and the reason
21 Vita-Mix basically withdrew 15 claims of
22 their patent from 16 and kind of summarized
23 as to one was the way they argued about the
24 prior art, Jacobsen, and the fact that, well,
25 there is a stir stick and so forth and so

1 on. What they did not disclose, Vita-Mix,
2 was the fact that the problem existed but
3 nobody knew about it.

4 For example, the way they got around
5 the Jacobsen's patent was -- in other words,
6 the patent examiner did not have access to
7 the Wayne patent and Vita-Mix, in my opinion,
8 incorrectly claimed that they were the first
9 one who understood the problem. And how
10 could Jacobsen, who doesn't even talk about
11 the existence of a problem, offer a
12 solution? So this is a very huge
13 assumption.

14 So this is one of those things that, in
15 my opinion, has fallen between the cracks.
16 I'm not criticizing the patent examiner but
17 if the patent examiner had access to Wayne,
18 they might have had a different situation.
19 So here we have a kind of gray zone area that
20 all of us are trying to resolve.

21 Q So is it accurate, then, that Jacobsen
22 does not disclose air pockets or preventing
23 air pockets?

24 A It does not talk about air pockets and
25 that's exactly what the Vita-Mix has used to

1 allow -- to get allowance for this claim
2 because they say they are the only and first
3 ones who talk about air pocket and
4 deleterious problems of an air pocket, and
5 how could Jacobsen, who doesn't know about
6 this, would offer solution? But the
7 presumption, in my opinion, is if somebody
8 has a patent, they have access or knowledge
9 of the prior art. So if they don't
10 specifically talk about it, then
11 unfortunately the patent examiner kind of
12 didn't include that because he didn't have
13 access to the Wayne patent.

14 Q Is it accurate, then, that Harris also
15 does not disclose a method of preventing
16 formation of an air pocket?

17 MR. AYCOCK: Objection.

18 Lacks foundation.

19 A As I said, let's go back to the level
20 of ordinary skill in the art. When these
21 different patents put an object or a device
22 within the -- within the pitcher of a
23 blender, supposedly it does the exact same
24 thing that the plunger of Vita-Mix does.
25 Now, whether they talk about it or not, to

1 to say that a patent is invalid using that
2 particular patent and I'm trying to go
3 through the gray zone that how this has
4 developed. If it was as clear as what we
5 said, none of us would be here today.

6 Q That wasn't my question and I think I'm
7 figuring out the problem here. You keep
8 going on with these answers that have nothing
9 to do with my question.

10 This is my question: Does Harris
11 disclose a method of preventing the formation
12 of an air pocket, yes or no?

13 A Not explicitly --

14 Q No, it doesn't.

15 A -- but to a person of prior art, it
16 does. I mean, a person of ordinary skill in
17 prior -- in the field, it does.

18 Q How does Harris disclose or teach or
19 whatever, to a person of ordinary skill in
20 the art, preventing a formation of an air
21 pocket?

22 A I have to look at the -- I have to look
23 at the patent figures and I'll tell you
24 because I don't memorize anything.

25 Q Is it in your opinion? Isn't that

1 your --

2 A Yeah.

3 Q Is that your opinion?

4 A Yeah.

5 Q Explain to me your opinion, what that
6 basis is.

7 A I have to look at the figure of the
8 patent. I have to look at the figures that
9 are disclosed in that patent and I'll explain
10 it to you.

11 Q You do agree with me, though, that
12 Harris does not disclose a method of
13 preventing the formation of an air pocket?

14 A The only patent which directly does
15 that is Wayne.

16 Q Okay.

17 So Jacobsen also does not disclose a
18 method for preventing the formation of an air
19 pocket around rotating blades, correct?

20 A They don't explicitly talk about air
21 pocket, that's true, yeah. It's in the
22 patent.

23 Q The Vita-Mix 3600 and 4000 blenders, do
24 you recall those?

25 A Yeah.

1 and if my memory helps me, they say you can
2 turn the machine on and just leave and it
3 does the job. You don't have to come back to
4 it and stir occasionally and so forth and so
5 on. So any stirring, in my opinion, before
6 or after is not covered and the reason I just
7 wrote it like that is because it's a court
8 definition. I don't want to --

9 Q So it is your opinion that a method of
10 stirring before an air pocket has begun to
11 form is not covered under claim one of the
12 Vita-Mix '021 patent?

13 A It's not covered. The Vita-Mix patent
14 does not talk about any stirring in the
15 claim.

16 Q Take a look at the next row on page ten
17 of the left-hand column under "Elements of
18 Claim 1 of the '021 Patent"; do you see that?

19 A That's right.

20 Q It states, "the air pocket being
21 created from an air channel of a cross-
22 sectional size defined by a member associated
23 with the blades"; do you see that?

24 A That's right.

25 Q What is your understanding of that

1 term?

2 A First of all, if I want to get
3 technical, I do not consider this statement
4 accurate and correct. Physically this is not
5 correct.

6 Q What is your understanding of this
7 term, sir?

8 A This understanding says that there
9 exists a member associated with the blade
10 that defines the cross-sectional size of the
11 air channel. That's my understanding. And
12 then further, when that is the case, there is
13 a statement that it is basically mutually
14 exclusive from the above, the top statement.
15 It says, "Comprising the step of supplying a
16 fluid in the pitcher."

17 Q I don't understand what you mean by
18 that. What do you mean by that, sir?

19 A The second sentence has nothing do to
20 do with the first sentence. It says, "The
21 air pocket being created from an air channel
22 of a cross-sectional size defined by a member
23 associated with the blades," comma, so that's
24 the kind of technical assertion which is not
25 necessarily correct, and then all of the

1 member associated with the blades?

2 A The sentence doesn't say --

3 MR. AYCOCK: Could I have
4 that question back?

5 (Record read.)

6 A My personal opinion is definitely yes,
7 there are many other parameters, and this
8 patent has been totally silent about them.

9 Q One of the parameters that creates the
10 air channel is the member associated with the
11 blades; is that accurate?

12 A Repeat the question.

13 (Record read.)

14 A See, you're throwing the member
15 associated -- take that "member associated"
16 out; is that what you mean?

17 Q No.

18 I'm asking you if the member associated
19 with the blades is one of the factors or
20 parameters that defines an air channel.

21 A Yes, definitely. Oh, yes.

22 Q Your opinion or understanding is that
23 other parameters or factors affect the air
24 channel as well; is that right?

25 A And they are more important, that's

1 right.

2 Q But one of the factors is a member
3 associated with the blades; is that
4 accurate? Did you hear my question?

5 A No, not really.

6 Q That's okay. I'll ask it again.

7 One of the factors that --

8 A One of the factors is this but it is
9 the least important factor.

10 Q Let me ask my question fully just so
11 it's on the record.

12 A Yeah. Yeah.

13 Q One of the factors that affects or
14 defines -- let me strike that.

15 One of the factors that -- let me
16 strike that again.

17 A member associated with the blades
18 defines an air channel; is that accurate?

19 A As one of the least important factors.

20 Q But it is one of the factors?

21 A It's one of the least important ones,
22 yeah.

23 Q Is it your opinion or understanding,
24 then, that claim one of the '021 patent, the
25 air channel that's being defined is only

1 (Plaintiff's Exhibit 106 was
2 marked for identification.)

3 - - - - -

4 Q I'm going to hand to you what's been
5 marked as Plaintiff's Exhibit 106.

6 A Sure.

7 Q At the top it states 2,757,909 and
8 that's US patent number 2,757,909. The
9 inventor's name is JC Wayne. Do you see that
10 document in front of you, sir?

11 A That's right.

12 Q Have you ever seen this document
13 before?

14 A Yes.

15 Q What is it?

16 A This is the patent application and
17 patent allowed for a food processing blender
18 or mixer that had certain attributes.

19 Q What's your understanding of -- what's
20 your understanding of what Wayne teaches?

21 A What Wayne teaches, first of all, it
22 identifies the problem that Vita-Mix asserts
23 that they were the first one to understand
24 about this deleterious air pocket. Wayne
25 talks about sizable bubbles which may get

1 involved with the blender and make the blade
2 inefficient so he tries to resolve that by
3 putting a device above and adjacent to the
4 rotating blades and basically solve the
5 problem. And on top of that, he has some
6 additional feature and the additional
7 feature, which I call like icing on the cake,
8 is he provides a groove in that device which
9 is above and adjacent to the blade to augment
10 the pumping of the material toward the
11 blade. That's my understanding of this
12 patent in a nutshell.

13 Q Does Wayne require that auger or
14 component in order for the Wayne blender to
15 work, do you know?

16 A Say that again.

17 Q Sure.

18 Does Wayne require that auger component
19 in order for the blender device set forth in
20 Wayne to actually work?

21 A To work effectively or in general?

22 Q To effectively work.

23 A Actually, he's kind of disclosing that
24 and he claims that it is going to enhance the
25 performance.

1 Q -- air pocket or air channel is defined
2 by a member associated with the blades?

3 A I'm talking about existence of air
4 channel to begin with. I'm saying that an
5 ordinary person skilled in the art knows that
6 a rotating blade of a blender first creates
7 an air channel and then that air channel
8 grows in depth and reaches the blade and
9 depending upon the content of the pitcher, it
10 may or may not translate or have a transition
11 to an air pocket.

12 Q Your understanding of what a person of
13 ordinary skill in the art would understand in
14 terms of the formation of an air channel
15 defined at least in part by a member
16 associated with the blades is based here in
17 2008 today, right?

18 A Yeah, as kind of one of the parameters
19 and as I said, the least important parameter.

20 Q Okay.

21 And now I want you to go back, though,
22 in time to 1956.

23 A Okay.

24 Q Here's Wayne -- the Wayne patent in
25 front of you. Show me where Wayne discloses

1 that an air channel is defined by a member
2 associated with the blades. Can you show me
3 that in that patent?

4 A As I'm saying, even in 1957, people
5 were observant. There is no changing
6 observation of people. He has actually
7 observed air pockets or air bubbles of enough
8 dimensions that causes the blade to be
9 ineffective and he puts a device right at the
10 point of the source of problem which is an
11 air channel. So if he specifically has not
12 talked about an air channel, it is implicitly
13 readable, in my opinion, from this patent
14 that he is actually solving the exact same
15 problem and he, in some points in his patent,
16 he explicitly talks about that. So --

17 Q Other than --

18 A I'm sorry. Let me finish.

19 Q Sure.

20 A So if we are going to look at one-to-
21 one statement of the observation and
22 solution, we may not find that, but to a
23 person of ordinary skill in the art, that is,
24 in my opinion, what is extracted out of this
25 patent.

1 In other words, if I see this patent or
2 if somebody who has the ordinary skill in the
3 art sees this patent, knows that the air
4 pocket is generated from the center of the
5 blender so if we have a device there to
6 somehow assist, either by pumping the fluid
7 just like this and having an auger shape to
8 it or to have something in there to occupy.

9 Now, these things said, I reserve the
10 right to say that they are not effective when
11 I come to enablement because these are all
12 perceived, kind of, simplistic view of a
13 solution to this problem. So when I say
14 these things in my deposition and when I come
15 later on during the deposition and say
16 basically none of the systems work as
17 intended, I reserve the right for that.

18 Q Are you --

19 A But I'm just comparing concept to
20 concept.

21 Q Sure.

22 Just based on that statement, is Wayne
23 enabling, do you believe, in your opinion?

24 A Probably not. I don't know. I'd have
25 to test it. But here I was just testing -- I

1 mean, comparing document to document, not
2 performance to performance.

3 Q Okay.

4 So based on the Wayne patent and what
5 it discloses, you don't believe today as
6 we're sitting here, and especially compared
7 to the Vita-Mix '021 patent, that the Wayne
8 patent itself is even enabling; is that
9 accurate?

10 A That's an accurate -- Wayne may not
11 work either. In other words, in my opinion,
12 Vita-Mix doesn't work and Wayne may not work
13 either.

14 Q Okay.

15 A Here, I'm just kind of comparing
16 statement to statement --

17 Q Sure.

18 A -- teaching to teaching, not going to
19 lab and testing.

20 Q So your opinion, then, is that neither
21 the Vita-Mix '021 patent nor the Wayne patent
22 are enabling to a person of ordinary skill in
23 the art?

24 A Definitely. On the Vita-Mix I have
25 tested, on the Wayne I have to test, but

1 you're absolutely right. I give 90 percent
2 that even this doesn't work (indicating).

3 Q You said that you tested the Vita-Mix.
4 What do you mean by that in terms of
5 enablement?

6 A Enablement, I tested -- I created two
7 types of extreme fluids. One is very thin
8 like pure water and I have added a couple of
9 drops of food coloring just for visualization
10 so it doesn't change the viscosity or
11 anything and then I have ran the Vita-Mix
12 device from low RPM and I have done a series
13 of tests. One was totally without the
14 plunger and as you increase the RPM you see
15 the formation of an air channel which dips
16 down and as you increase the RPM, that air
17 channel keeps traveling toward the blade and
18 if you keep the RPM low enough, the air
19 channel is there but the water is
20 transparent. You can see through. It's
21 translucent. If you increase the RPM beyond
22 a certain level, the channel reaches the
23 blade and you have air reaching the blade and
24 that blade breaks up that air channel and
25 makes the water murky so it is no longer

1 see-through and then when you lower the RPM,
2 the same thing happens. That's experiment
3 number one.

4 Then if I am a -- kind of observant, I
5 could have an ordinary skill in the art or I
6 could be a scientist or ordinary people. I
7 say, okay, now that this channel is
8 generated, if I put a solid piece in there, I
9 occupy the space so I am going to get rid of
10 that channel, so therefore, I designed this
11 and I go and get a patent for it.

12 But when I do the same test with a
13 plunger in, in vertical position untouched
14 and I start increasing the RPM, the same
15 channel starts -- starts to form again
16 despite the existence of the plunger and it
17 travels down on the sides of the plunger and
18 every now and then, as a result of fluid
19 mechanics action in there, kind of bubbles of
20 air is thrown toward the blade. And if I
21 increase that, at some point the channel
22 forms as an annular space around the plunger
23 or device and it gets to the blade. In other
24 words, existence of this plunger is not able
25 to prevent formation of a channel to begin

1 with which eventually translates to an air
2 pocket.

3 Q Now -- go ahead.

4 A So this was for one class of fluids
5 which was kind of Newtonian fluid and low
6 viscosity, relatively low viscosity fluid and
7 so forth.

8 Then if you go to the extreme case
9 which makes your fluid a little bit more
10 viscus like a pancake batter, and usually
11 when you mix flour and water the fluid
12 becomes usually non-Newtonian -- and if you
13 want an accurate definition of that I can
14 tell you later -- but under the same
15 condition now you don't observe anything
16 because the content is not translucent. But
17 when you turn on the machine, somehow air
18 gets around this infamous plunger, gets to
19 the blade and stays there. And depending
20 upon many other variables, either you totally
21 make the blender inefficient or partially
22 efficient and then when you turn the system
23 off, one or two big bubbles of air comes up
24 and that is the air that was supposed not to
25 be there because of the plunger.

1 Q Going back to the second row in Wayne
2 where you say that Wayne discloses, "Air
3 bubbles or air pockets are created in the
4 Wayne blender from an air channel of a cross-
5 sectional size defined by a member associated
6 with the blades," what you're saying there is
7 that that is implicit in Wayne but it does
8 not actually explicitly disclose it; is that
9 accurate?

10 A That is my understanding. That's
11 accurate. And here, if I may add, again, I'm
12 just trying to compare apple to apple because
13 personally as a scientist, I don't believe
14 that this particular member associated with
15 the blades is defining that. It's one of
16 the -- I'm just trying to compare a statement
17 that is implicitly in there. So for a person
18 of ordinary skill in the art, they could see
19 that.

20 Q Can you show me where in the Wayne
21 patent Mr. Wayne implicitly knew that an air
22 channel is defined at least in part by a
23 member associated with the blades?

24 A By positioning his auger right adjacent
25 and above the blade. In other words, he got

1 the same idea of, okay, then there's going to
2 be a space there, an air channel, so let me
3 just put that, and I may mention
4 approximating the member, as you can see, so
5 the size of that auger may touch the fluid
6 content or blend content and pump it back
7 in.

8 Remember, people who are designing
9 these, they are running a blender without
10 anything to begin with so they get some idea
11 about what is the habit of the fluid inside
12 the blender. So if the channel is a certain
13 size, they're going to say, well, I'm going
14 to put something in there to occupy that
15 void. What they don't consider is fluid
16 has -- fluids have other habits. They go
17 around things just like the way it goes
18 around the plunger of Vita-Mix.

19 Q Can you show me where Wayne discloses a
20 cross-sectional size or teaches, for that
21 matter, explicitly teaches a cross-sectional
22 size for a plunger or a device that can be
23 inserted into a blender?

24 A Actually this auger, item number A3 in
25 his first figure.

1 Q Okay.

2 A That is the, basically, teaching of
3 having a device above and adjacent to the
4 blades.

5 Q Can you show me where you disclosed
6 that in your chart on the right-hand side on
7 page ten, where you disclosed that --

8 A On the third row on the right-hand
9 side. "Wayne includes a device that can be
10 inserted into a blender which has a cross-
11 sectional size approximating the cross-
12 sectional size of a member associated with
13 the blades."

14 Q So your opinion is that the agitator
15 component or that agitator in the Wayne
16 patent shown in figure 1 is the device that
17 can be inserted into a blender?

18 A Exactly. That's what I call the
19 device. You call it the agitator but I call
20 it the device.

21 Q That's not what I call it; that's what
22 Wayne calls it.

23 A I know, but based on the definition of
24 the court I would say, okay, this is a device
25 that is above and adjacent to the blades

1 because "blade" has a definition. Those two
2 up and down cutting figures, that's the
3 blade. It has a hub, and I'm going to
4 momentarily accept the definition of that as
5 the member associated with the blade and very
6 clearly he has item A3 as the device which
7 has substantially approximately the same
8 cross-sectional size as the member below. So
9 I see all of these things in this figure
10 because for me as an engineer, sometimes
11 drawings are even more important than
12 descriptive words.

13 Q Other than in figure 1, can you
14 identify for me, by column and line number in
15 the Wayne patent, where it discloses a
16 plunger or a device that can be inserted into
17 a blender having a particular cross-sectional
18 size?

19 A I am referring only to figure 1 on that
20 particular column for a person of ordinary
21 skill in the art.

22 Q So it's your opinion that the only
23 place where Wayne discloses a plunger having
24 a particular --

25 A Not plunger.

1 Q A plunger or a device.

2 A Device.

3 Q Having a particular -- let me start
4 over again. Let's --

5 MR. AYCOCK: Just one -- let
6 him state his question and if you
7 have a problem with his question,
8 answer it in the answer.

9 THE WITNESS: Sorry.

10 MR. AYCOCK: One at a time
11 for Carla's sake.

12 MR. CUPAR: Thank you,
13 Mr. Aycock.

14 Q Can you identify for me, by column and
15 line number, where Wayne discloses a plunger
16 or a device that requires a particular cross-
17 sectional size?

18 A In the very image of the patent he
19 doesn't explicitly refer to that; in the
20 figure he does.

21 Q So you are only inferring from the
22 figure that Wayne is disclosing or teaching a
23 member having a particular cross-sectional
24 size?

25 A Absolutely.

1 Q Moving on, then, for the member
2 associated with the blades, where does Wayne
3 disclose a particular cross-sectional size of
4 a member associated with the blades?

5 A Again, in the first figure I can see
6 the member associated with the blades
7 according to the Vita-Mix assertion and right
8 on top of that, I see the auger or device
9 member A3 in the same figure and they have
10 approximately the same cross-sectional size.

11 Q So is it your opinion that the cross-
12 sectional size of a member associated with
13 the blades is disclosed in figure 1 of the
14 Wayne patent; is that accurate?

15 A Absolutely.

16 Q Can you identify for me where else in
17 the specification, by column or line number,
18 where Wayne discloses a member associated
19 with the blades having a particular cross-
20 sectional size?

21 A Not in the verbiage but in the figure.

22 Q So your only basis for your opinion is
23 figure 1 of the Wayne patent; is that
24 accurate?

25 A Exactly, and that's what I think --

1 this figure is enough for a person with
2 ordinary skill in the art to draw these
3 conclusions.

4 Q Can you identify for me where Wayne
5 discloses that the cross-sectional size of a
6 plunger or device that can be inserted into a
7 blender approximates the cross-sectional size
8 of a member associated with the blades?

9 A In the figure again, and as I said,
10 people who are doing these kind of inventions
11 and practices, they run the blenders without
12 any device, they observe the column or air
13 channel generated and they try to do
14 something about it and that is exactly the
15 cross-sectional -- I mean, by kind of naked
16 eyes you can see that the diameter of the
17 auger is approximating the diameter of the
18 hub of the blade.

19 Q That's just based on your opinion based
20 on the visual of figure 1; is that accurate?

21 A Absolutely. Because to me, this figure
22 is somewhat to scale in kind of two or more
23 directions. In other words, it is not shrunk
24 down or it's not widened so this is the
25 typical proper proportions of a blender.

1 Q Do you know if patent drawings are
2 drawn to scale, sir?

3 A Not necessarily, but from this I can
4 extract that.

5 Q So you know that patents are not
6 normally -- normally have figures that are
7 not drawn to scale; is that accurate?

8 A That is accurate.

9 Q Yet you are of the opinion that this
10 Wayne patent figure 1 is drawn to scale; is
11 that right?

12 A That is drawn to scale, in my opinion,
13 because of being familiar with blenders, yes.

14 Q Why can you deduce that this figure is
15 drawn to scale when you know that patent
16 figures are normally not drawn to scale?

17 A Because of common sense.

18 Q Anything else?

19 A No. Common sense.

20 Q So other than your common sense you do
21 not know if the Wayne blender shown in figure
22 1 is drawn to scale, correct?

23 A Because the word "approximate" has been
24 used. If there is any deviation from this
25 figure, it falls into the definition of

1 approximate, so therefore, for me, the
2 teaching is there.

3 Q Can you identify for me the cross --
4 what's the size of the -- well, let me back
5 up.

6 So it is your opinion that the Wayne
7 patent on figure 1 is drawn to scale,
8 correct?

9 A To some extent, I mean, covering the
10 word "approximation," yes, I can deduce sizes
11 from this drawing, yes.

12 Q You said "to some extent." Is the
13 Wayne patent drawing in figure 1 drawn to
14 scale or not?

15 A If you're talking about exact with
16 engineering tolerance as plus or minus
17 one-thousandths of an inch, I don't make a
18 comment on that, but to fall into the
19 definition of approximating sizes, definitely
20 they are in scale.

21 Q Other than in figure 1, can you tell me
22 where in Wayne that Mr. Wayne discloses that
23 the cross-sectional size of the device that
24 can be inserted into a pitcher must
25 approximate the cross-sectional size of a

1 member associated with the blades?

2 A On figure 3, the next page, with the
3 cross-sectional device which is referred to
4 as A3 and the hub of the blade, which I
5 considered, according to the Vita-Mix, as the
6 member associated with the blade and they are
7 approximating to me.

8 Q Is it your opinion that figure 3 is
9 also drawn to scale?

10 A It looks like it because it has all the
11 dimensions in a certain scale and proportions
12 that if I include the variations of
13 approximation technology, it is drawn to
14 scale but if you're asking me whether the
15 tolerance of plus or minus one-thousandth of
16 an inch has been observed, there's no need
17 for that because here we are just teaching
18 something in general concept.

19 Q Other than the figures 1 and 3, can you
20 identify for me where else you believe
21 Mr. Wayne disclosed that the cross-sectional
22 size of the device inserted into the pitcher
23 must be -- must approximate the cross-
24 sectional size of a member associated with
25 the blades?

1 A These are the figures.

2 Q So nothing else in the Wayne patent
3 discloses that the cross-sectional size of
4 the device inserted into the pitcher
5 approximates the cross-sectional size of a
6 member associated with the blades?

7 A Your statement is true and these two
8 figures are enough for an ordinary skilled in
9 the art to make deductions.

10 Q Have you ever measured the agitator
11 component identified in figure 3, the cross-
12 sectional size? Let me repeat my question.

13 Have you ever measured the cross-
14 sectional size of the agitator component in
15 figure 3?

16 A I can't even tell you right now by
17 eyeballing. It's about -- anything between
18 three-quarters of an inch and one inch as
19 shown in this figure.

20 Q But prior to your eyeballing it today,
21 have you ever measured figure 3 of the Wayne
22 patent?

23 A I had the same opinion when I
24 previously looked at that. That's how I came
25 to my conclusion.

1 A No.

2 Q -- of the Wayne patent?

3 A No, you don't need to.

4 Q So it's your opinion that you don't
5 need to measure the cross-sectional size in
6 the Wayne patent to determine what its cross-
7 sectional size is; is that right?

8 A The reason the word "approximation" has
9 been used, it eliminates the requirement for
10 exact measurements with any tolerances. It
11 is approximating with naked eyes. Vita-Mix
12 asserts that their plunger approximates the
13 hub of the blade assembly so I use the same
14 criteria and exactly put it here.

15 Q Can you identify for me, by using that
16 pink highlighter again, the -- what the
17 central hub of the blades is on the Wayne
18 patent?

19 A Okay. I'm going to draw two vertical
20 lines and then put two arrows next to it.
21 The lower arrow.

22 Q Can I see that? Can you show for the
23 video?

24 A Yeah. And if I do the same thing to
25 Vita-Mix, I have exact deviation or even

1 causes an air channel.

2 Q Does Wayne disclose anywhere that the
3 agitator or helical component has to
4 approximate the cross-sectional size of a
5 member associated with the blades?

6 A Not at all. Not at all.

7 Q So it does not have to; is that right?

8 A It does not have to because as a person
9 with ordinary skill in the art, I can extract
10 that.

11 Q So is it your opinion that the agitator
12 or auger component 43 -- cross-sectional size
13 of that auger component does not have to
14 approximate the cross-sectional size of a
15 member associated with the blades in the
16 Wayne patent; is that right?

17 A Please repeat the question.

18 Q Sure.

19 Is it your opinion that the cross-
20 sectional size of the auger component in
21 Wayne does not have to approximate the cross-
22 sectional size of a member associated with
23 the blades for the blender device in Wayne to
24 work?

25 A It has to approximate because if it is

1 too narrow it falls in the cavity of the air
2 channel and it doesn't do anything. It has
3 to touch the fluid so it has to basically be
4 large enough to contact the fluid and then
5 pump the fluid downward.

6 Q Other than your prior opinion regarding
7 figures 1 and 3, can you show me where in
8 Wayne that is disclosed or taught?

9 A As I said, as a person with ordinary
10 skill in the art, I can draw all of these
11 conclusions. In other words, if I see a
12 blender without any device or plunger having
13 an air channel, when I see that, I say, well,
14 why not. We should put something in there.

15 Q So in other words, your opinion is that
16 Wayne does not disclose an auger component
17 having a cross-sectional size that
18 approximates the cross-sectional size of a
19 member but that you can imply or infer that
20 from Wayne; is that accurate?

21 A That is very accurate and I kind of --
22 if you'll allow me to elaborate on that, if I
23 turn a kind of blend and look at the top view
24 of the contents in the blender and I see that
25 I have a hole or a channel which is about one

1 inch in diameter, it is very kind of
2 unrealistic to design an auger which is only
3 a quarter of an inch and expect to do
4 anything. So you are going to be large
5 enough in the diameter. That contacts the
6 fluid. And what is the diameter of that is
7 dictated by many parameters, among them this
8 hub section, and then you want to approximate
9 these two. So, I mean, this is so common
10 sense in design and engineering that there is
11 no need to look for any explicit statement in
12 the patent because in 1957, the author of
13 this patent was not the author of the Vita-
14 Mix patent for the choice of force.

15 I would like to make one more
16 statement. The reason the wording of the
17 Vita-Mix patent is as-is is because of the
18 problems that they had during prosecution so
19 they reworded until it is being allowed. So
20 I'm not expecting to look at word by word
21 kind of one-to-one correspondence and
22 correlation between the two and say he said,
23 explicitly, approximating and they said,
24 explicitly, approximating.

25 Q So your opinion is that the Wayne

1 patent is not a one-to-one correlation with
2 claim one of the Vita-Mix '021 patent; is
3 that accurate?

4 A No. From a design point of view it's a
5 one-to-one correspondence; from various point
6 of view, it doesn't need to be.

7 Q From the what point of view?

8 A Performance and configuration. It's
9 one-to-one correspondence but from verbiage
10 of the explanation of the figure, it doesn't
11 need to be because two authors have two
12 different styles and tastes of writing.

13 And by the way, this is the
14 preferred -- as a person who is studying a
15 patent, I realize that this is a preferred
16 embodiment. Very easily as a designer, as a
17 person with ordinary skill in the art, I can
18 invert this device and put it on the lid of
19 the device very easily. In other words, the
20 transition from having it on the rotor, I can
21 have the mirror image inverted on the lid and
22 the difference would be now it doesn't rotate
23 anymore, it's going to be stationary, but it
24 fills the gap or it fills the air channel and
25 because it has some grooves, it may, I don't

1 is identified as 24 millimeters is about 218
2 percent larger than the cross-sectional size
3 of the auger component; is that accurate?

4 A That's accurate, yes.

5 Q Based on your measurement in Wayne, the
6 cross-sectional size of the central hub is
7 about 190 percent larger than the cross-
8 sectional size of the auger component; is
9 that accurate?

10 A 119 or 90?

11 Q 90. 190 percent larger.

12 A It's almost twice as much, yeah.

13 Q So it's your opinion here today that
14 the cross-sectional size of the bearing
15 housing which is about 218 percent larger
16 than the cross-sectional size of the auger
17 component approximates one another?

18 A If I consider the same criteria of
19 Vita-Mix, yes, because if I did the same
20 measurement on the hub and diameter of the
21 plunger at its larger portions, I'll have
22 almost the same type of numbers, and again,
23 the word is "approximate" and it's pretty,
24 kind of, wide open.

25 And then one more thing added to that,

1 as I said, when we are looking at inventions
2 and generating a new device, if somebody in
3 the ordinary skill in the art looks at the
4 cross-section of the channel generated and he
5 or she wants to put a device there to prevent
6 that, I'm sure nobody would say, "Let's put
7 something which is lesser than the cross-
8 sectional size of the channel." So
9 regardless of what these numbers are, they
10 would have a device which basically fills the
11 space and that's exactly what Vita-Mix people
12 have tried to do.

13 Q Is it your opinion that the accused
14 Back To Basics blenders -- that the cross-
15 sectional size of the stir stick in the Back
16 To Basics blenders approximates the cross-
17 sectional size of the member associated with
18 the blades in the Back To Basics blenders?

19 A That's right, yes.

20 Q Going back to the Wayne component, it
21 is your opinion that even though Wayne does
22 not explicitly disclose that the cross-
23 sectional size of a device inserted into the
24 pitcher, such as an auger component,
25 approximates the cross-sectional size of a

1 member associated with the blades, that your
2 measurement of the bearing housing being 218
3 percent larger than the cross-sectional size
4 of the auger component nevertheless
5 approximates; is that accurate?

6 A That's --

7 MR. AYCOCK: Can I have that
8 question read back, please?

9 (Record read.)

10 MR. AYCOCK: Objection.

11 Vague.

12 A My answer to that is we are in the
13 realm of nonquantitative numbers and all of
14 the sudden we are hearing millimeters and
15 percentages because in the patent's teaching,
16 there is no quantitative in the claim
17 language, therefore, no one is there to
18 define what approximates means. But based on
19 the common sense, nobody will sit down and
20 design member 43 of Wayne smaller than a
21 typical observed air channel, so this is
22 basically contrary to common sense. So
23 whatever physics happens inside the blender,
24 whoever, which is Wayne, has designed member
25 number 43 or device number 43, it has to be

1 large enough to occupy that space. So our
2 measurements on this figure is not going to
3 kind of bring anything contrary to what I am
4 learning from this patent.

5 In other words, again, if we go to
6 extreme of the case, if I'm blending
7 something for which a channel is generated
8 one and-a-half inch in diameter, I'm not
9 going to sit here and design something which
10 is 11 millimeters. I'm going to design
11 something or put that device that is at least
12 one and-a-half inch and if you convert it to
13 millimeters, whatever it is, 25 plus 12,
14 30-some millimeters.

15 So what I'm trying to say is when you
16 study the figures of the Wayne disclosure, it
17 gives you or it leads you to invention of a
18 device that is going to occupy the void, the
19 channel. So as I said, and I repeat myself
20 again, nobody will sit down and design an
21 auger of 43 as big as this marker in diameter
22 when the channel is two inches in diameter.
23 That is contrary to common sense, contrary to
24 the actions and attitude of an ordinary --
25 person with ordinary skill in the art.

1 So therefore, getting to numeric of 11
2 versus 21 millimeters, 11 versus 24
3 millimeters and these percentages is not the
4 issue and even Vita-Mix patent has not gone
5 to quantitative measurements in their claim.
6 So we are here and just comparing, for the
7 sake of anticipation, device with device in
8 writing, so I'm saying that this basically
9 leads me to go in that direction. And as a
10 matter of fact, I am taking one step
11 further. This very number 43 can be inverted
12 and put it on the lid. That's for a person
13 with ordinary skill in the art, that is the
14 first thing which comes to my mind.

15 Q Based on your opinion in your testimony
16 that you just provided, is it accurate, then,
17 in the Wayne patent that a person of ordinary
18 skill in the art, based on the teachings in
19 Wayne, can increase the size of the bearing
20 housing without increasing the size of the
21 auger or agitator component and still end up
22 with the invention set forth in Wayne?

23 A Actually, as I said before, a person
24 with a skill in ordinary art is going to
25 proportionally size them. In other words,

1 first of all, this auger 43, in my opinion,
2 is one of the last parts that goes to this
3 blender. So if they have a given hub, a
4 given flat portion for the blade and a given
5 content for the blender, they run it and they
6 observe the size of the channel, the cross-
7 section of the channel, then they say,
8 "Ah-ha. Let's have something which fills the
9 gap." So that is something that's kind of so
10 intuitive for a person with skill in
11 ordinary -- with ordinary skill in the art
12 that to me, it is not an issue.

13 So if they increase the size of the
14 bearing housing proportionally and if that is
15 truly defining the -- allegedly defining the
16 size of the cross-section which I still have
17 some reservation for that, then they have to
18 decrease the size of 43 proportionally to
19 fill up the gap.

20 Remember, what motivates for people to
21 go after invention? Performance. So if you
22 observe air channel of one and-a-half inch in
23 diameter or 36 millimeter in diameter, you
24 won't sit down and just design 43 of 11
25 millimeter. You make it 40 -- I mean, 38

1 millimeters. So you have a tolerance of 2
2 millimeters, 1 millimeter to each side to
3 occupy the place. But as I said, the fluid
4 has its own behavior which is kind of a
5 little bit beyond all of these performances
6 that everybody claims.

7 Q Your opinion is that this auger
8 component 43 is the plunger or the device
9 inserted into the blender; is that accurate?

10 A That is accurate. This is a device
11 which is adjacent and above the blade.

12 Q How is it adjacent to and above the
13 blades if it's contacting or touching the
14 blades?

15 A Again, I go back to the definition of
16 the court and this adjacent, above, just
17 means that. It doesn't mean it shouldn't
18 touch or it should touch. If it was an
19 issue, I was expecting to see that. And
20 again, when you see my tables in this
21 anticipation, I am just comparing word by
22 word because there is an allegation of
23 infringement and I'm trying to respond to
24 that through prior art. So personally, I'm
25 not going to accept any other extra

1 definition of adjacent and above. Adjacent
2 and above means exactly that.

3 Q Take a look at page ten, Plaintiff's
4 Exhibit 105 which is your invalidity expert
5 report, sir.

6 A That's right.

7 Q There's a chart there on page ten; do
8 you see that chart?

9 A That's right.

10 Q On the left column, the third row down,
11 there's a statement, "Positioning"; do you
12 see that?

13 A Uh-huh.

14 Q It states, "Positioning" -- it's
15 claim -- it's a term out of claim one of the
16 '021 patent; do you see that?

17 A Uh-huh.

18 Q It states, "Positioning a device that
19 can be inserted into a blender having a
20 cross-sectional size approximating the cross-
21 sectional size of the member adjacent to and
22 above the rotating blades"; do you see that?

23 A Uh-huh.

24 Q Can you explain to me how in Wayne a
25 person of ordinary skill in the art or anyone

1 quantitative from the very beginning, you
2 have to define your scale and then you
3 have -- on top of that, you have to define
4 your tolerances.

5 Q You would agree with me, too, that the
6 auger component which is attached to this
7 entire blade assembly in figure 3 of the
8 Wayne patent cannot be adjacent to and above
9 the blades that you identified as 28 and 29;
10 is that accurate?

11 A As I said, I believe that this is
12 adjacent and above, so that, I think, should
13 answer your question. The auger of 43 of
14 Wayne is adjacent and above. It is not
15 outside of the blender, it is not on top of
16 the lid, it is very close to the blade
17 adjacent and above.

18 Q I want you to now take -- do you see
19 the blade that you marked as 28?

20 A Uh-huh.

21 Q Is the top tip of the blade 28 that you
22 marked higher -- is it above the auger
23 component, the bottom portion of the auger
24 component?

25 A Again, we have a range here so

1 I'm trying to say is what motivates the
2 designer to design this is the size and
3 dimensions of the air channel, so the name of
4 the game is to fill that air channel. So
5 nobody would come and design an auger which
6 is only two inches high when the air channel
7 starts on the very top. And depending upon
8 the level of filling in the pitcher -- so if
9 somebody wants to fill the pitcher all the
10 way to the top, the auger must extend all the
11 way to the top to be effective.

12 Q You would agree with me that the auger
13 component 43, at least a part of it, is lower
14 than the rotating blade 28, correct?

15 A A part of it is lower than a part of
16 the blade but the overall center of it must
17 be above the blade to be effective even for
18 Wayne.

19 Q So Wayne does not teach that the entire
20 auger component has to be above the blades;
21 is that accurate?

22 A Actually, my understanding from Wayne
23 is it must be above the blade; otherwise, it
24 wouldn't work. In other words, if we take
25 your example and take it to an extreme and

1 bend this blade upward toward the tip of
2 the -- to the free level of the content in
3 the pitcher, then this auger would be
4 ineffective. It would be part of the hub
5 assembly, basically. So therefore, the auger
6 must extend far above the blade to be
7 effective.

8 Q But the auger does extend below the
9 blade, too, in the Wayne patent; is that
10 accurate?

11 A Below part of the blade but definitely
12 all of it above the left side which is
13 slanting down and part of it is below the
14 blade on the right and most of it is above
15 it. So if we go to the definition of
16 centroid, it has to be, and that is just
17 working with terminology.

18 In order to make Wayne work as he
19 alleges, it has to be way above the blade to
20 work because, remember, what are we doing in
21 a blender? We are pumping. These two blades
22 are pumping the fluid in different directions
23 that has an overall component upward and then
24 it comes back down through the center. So
25 you have to go up there and capture that

1 fluid.

2 Q So you would agree with me that Wayne
3 does not disclose or teach that the entire
4 auger component has to be adjacent to and
5 above the top tip portion of the rotating
6 blade 28, right?

7 A As I said to you previously, Wayne does
8 not explicitly talk about adjacent and above,
9 it does not talk about cross-sections. Wayne
10 teaches to have a device which basically
11 fills up the void generated and it has an
12 additional function of an auger which helps
13 to pump the fluid downwards. So if the sides
14 of this auger are not touching the fluid,
15 Wayne doesn't have an invention. So nobody
16 will sit down and make a blender according to
17 Wayne and have the blender so narrow and so
18 small in height, then it justifies the
19 purpose. So any person with ordinary skill
20 in the art would make the item number 43
21 large enough lengthwise and cross-section-
22 wise to be effective because, again, we are
23 talking about a person with ordinary skill
24 here.

25 Q Take a look at your -- well, what's

1 your opinion regarding whether Wayne is
2 maintained -- the auger component Wayne is
3 maintained free from contact with the
4 pitcher?

5 A Again, common sense. It is not
6 contacting because when I read Vita-Mix's
7 patent, not contacting the pitcher means that
8 they are based on the prosecution histories
9 and even the statement of the patent it is
10 supposed to extend in the middle so they are
11 not -- they are saying that they are not
12 using that as a stir stick, they are using it
13 as a device that magically prevents air
14 pocket formation. So by not touching means
15 staying in the center on a vertical axis
16 pointing toward the blade and the same thing
17 is happening here, in my opinion.

18 Q Is it your opinion, then, that claim
19 one of the '021 Vita-Mix patent is limited to
20 the device inserted in the pitcher has to be
21 in the center of the pitcher?

22 A Actually, the booklet that Vita-Mix
23 provides teaches against that. It says use
24 it as a tamping device, stir it. If
25 something happens, take it out. So basically

1 disperse, dislodge or break up an air
2 pocket," I mean, we have to kind of honor
3 what the court says also on the very top. So
4 anytime you deviate from the center you are
5 basically going against what the court has
6 claimed -- defined this to be.

7 Q That's your opinion, right,
8 Dr. Rashidi?

9 A That is my opinion based on reading
10 what the court says.

11 Q Can you explain to me how the Wayne
12 device is maintained free of contact with the
13 pitcher?

14 A It is so obvious that -- I mean, it's
15 like by inspection. You don't even need to
16 explain. It's sitting there and it's not
17 contacting the walls of the pitcher.

18 Q Can you show me where in your report
19 you disclose that the Wayne patent discloses
20 that the device is maintained free of contact
21 with the pitcher?

22 A Actually, I'm assuming that this has
23 been provided as part of my report. I'm
24 referring to it, you have access to it and
25 you can see it for yourself so if I don't say

1 it explicitly in the right-hand column, it
2 doesn't mean it doesn't exist. I mean,
3 certain things which are too obvious I don't
4 feel compelled to write it. This is too
5 obvious, that when you have something on top
6 and above the blade as is in Wayne, it's not
7 going to touch unless it breaks.

8 Q But you didn't include, in any portion
9 of your report, any explicit disclosure
10 regarding Wayne; is that accurate?

11 A I am referring to the Wayne patent in
12 this table of comparison.

13 Q Right. I'm asking you the specific
14 citations of the disclosures.

15 A No.

16 Q You didn't provide that, correct?

17 A And I didn't feel any necessity to do
18 that because it's so obvious.

19 Q And that was because it's so obvious?

20 A It's so obvious.

21 Q Your understanding, as part of your
22 anticipation analysis, is that you do not
23 need to specifically disclose each and every
24 element out of claim one in the '021 patent
25 to Wayne; is that accurate?

1 A Would you repeat the question again?

2 (Record read.)

3 MR. AYCOCK: Objection.

4 Mischaracterizes the prior testimony,
5 vague and ambiguous.

6 A To answer that, who is going to
7 anticipate? A person with ordinary skill in
8 the art. So I am basically providing this
9 report and I'm demonstrating that a person
10 with ordinary skill in the art would
11 anticipate all of the things that '021 patent
12 is claiming or asserting so I don't need to
13 have a kind of statement-by-statement
14 correlation. I'm saying that for a person
15 with ordinary skill in the art looking at the
16 Wayne patent, they can anticipate that there
17 has to be a device or a solid piece in the
18 cavity of the air channel.

19 Q So you do not believe -- it's your
20 opinion that you do not have to disclose each
21 and every specific element or you do not have
22 to identify each and every specific element
23 out of the Wayne patent to anticipate -- to
24 come up with a determination of anticipation
25 of claim one of the Vita-Mix '021 patent?

1 MR. AYCOCK: Objection.

2 Mischaracterizes prior testimony.

3 A I think I have done that. I have done
4 element by element and actually my page ten
5 is self-explanatory. I'm saying that you
6 have some element on the left column and the
7 right element, sometimes explicit, sometimes
8 implicit, is in Wayne. In other words, when
9 they talk about the formation of an air
10 pocket, explicitly Wayne talks about air
11 pocket, deleterious air pocket, a large
12 enough bubble that causes problem. And then
13 on top of that, his drawings implicitly or
14 very vividly shows a person with ordinary
15 skill what to do.

16 Q Can you identify for me which of the
17 elements out of claim one of the Vita-Mix
18 '021 patent is shown implicitly based on
19 your -- implicitly based on your opinion in
20 the Wayne patent?

21 A These matter of cross-sections. The
22 ratios of the cross-sections. So Wayne never
23 goes explicitly to talk about approximating
24 size of something with something else but
25 it's there, it's implicitly there, and

1 anybody with ordinary skill in the art would
2 come up with the right conclusion in a very
3 easy fashion.

4 Again, I think I'm saying something
5 here and somehow we are passing by it. If
6 you see an air channel and you're an attorney
7 and you may not be a designer but if you see
8 an air channel inside a blender and I ask you
9 what size of a device do you do for Wayne
10 design, I'm sure you say, "At least as big as
11 the air channel," even though you may not be
12 a person of ordinary skill in the art of
13 blender design. So with the same token, the
14 person with ordinary skill in the art would
15 definitely come up with the right cross-
16 section. So if he doesn't talk about it
17 explicitly with that language because people
18 are not responsible for the language that one
19 patent attorney uses, they may express it in
20 different ways.

21 Q Just to be clear, then, you would agree
22 with me, then, while a person of -- you
23 believe a person with ordinary skill in the
24 art would find that obvious, Wayne does not
25 require that the cross-sectional size of the

1 don't want to get into that.

2 Q One of your tests here was using 32
3 ounces of clear corn syrup; do you see that?

4 A Yes.

5 Q Is that some sort of normal recipe that
6 people --

7 A No.

8 Q -- use?

9 A I had a purpose for that. I was trying
10 to demonstrate that the size of the air
11 channel is very much dictated by the liquid
12 consistency. Because the member associated
13 blade is the same size, the RPM is almost the
14 same, it's a little bit less because of the
15 viscosity, but I'm trying to say that
16 everything else constant in this machine, the
17 very fact that you change your liquid, your
18 air channel totally kind of changes in
19 configuration.

20 So I'm kind of indirectly disputing
21 '021 claim, that the air channel which is
22 defined by these two members. Because if
23 that -- if those things are the determining
24 factor and defining factors, the air channel
25 should stay the same size, so that is what

1 I'm trying to do with the corn syrup. So I'm
2 not trying to invite anybody to drink corn
3 syrup; I'm just trying to have an
4 experimental approach to say that viscosity,
5 density and other things are more important
6 than a member associated with the blade.

7 Q So in other words, these 32-ounce corn
8 syrup analyses are not exactly pertinent to
9 whether or not the Back To Basics blenders
10 infringe claim one of the '021 patent; is
11 that accurate?

12 MR. AYCOCK: Objection.

13 Lacks foundation.

14 A It does. Actually, it does, because
15 I'm saying that there actually exists no
16 member which singularly defined that air
17 channel. So I'm saying that your air channel
18 is totally different, for the same machine,
19 for the same cross-sectional areas on the
20 bearing housing and on the hub of the blade
21 and all of the sudden you get an air channel
22 which is very thin in diameter, very small in
23 diameter. So what happened here?

24 So all I'm saying is because, again,
25 for me as a researcher, I would say one

1 marked for identification.)

2 - - - - -

3 Q I'm going to hand you to you what's
4 been marked Plaintiff's Exhibit 110. It's US
5 patent number 4,561,782 to Jacobsen et al.
6 Have you seen this patent before?

7 A Yes, sir.

8 Q Can you identify for me where Jacobsen
9 discloses or teaches a cross-sectional size
10 for a plunger or a device to be inserted into
11 the pitcher?

12 A Actually if you look at this larger
13 figure on figure 3, right at the bottom
14 portion you see --

15 Q Are you referring to figure 2?

16 A Figure 3, actually.

17 Q Figure 3's that cap.

18 A I'm sorry. Figure 3. Okay. Figure 2
19 then. I'm referring to figure 2. If you
20 look at the item 21 with two twisting arrows
21 which matches exactly what Dr. Swanger
22 interpreted the word "turning," if you look
23 at the diameter of item 20, number 20, and if
24 you look at the hub portion of the blade that
25 is the member associated with the blade and

1 even by naked eyes they are very close to
2 each other so they are approximating each
3 other. And you can, again, become technical
4 on measuring the millimeters and coming up
5 with the ratios and percentage but this is
6 approximating the member associated with the
7 blade. And actually, it does not even teach
8 to rotate in terms of describing a cone. It
9 teaches exactly the same way that Dr. Swanger
10 alleges that teaching of the Back To Basics
11 encourages the customers to do it, so --

12 Q What basis do you have to state that
13 the cross-sectional size of Jacobsen should
14 be measured from the elongated portion 20 as
15 opposed to that rubber spatula 23?

16 A Because that is the location that the
17 air channel forms. In other words, the air
18 channel starts from the top and for a long
19 distance the air channel is not even aware of
20 this rubber piece and it comes down and then,
21 according to Vita-Mix allegation, the cross-
22 sectional size of that air channel is defined
23 by the hub portion of this blade. And that
24 hub portion is substantially or approximately
25 equal to the diameter of item number 20

1 because the air channel comes from the top so
2 it has to travel the axial direction of this
3 member number 20. So it basically --

4 Q What's more adjacent to the rotating
5 blades, the cylindrical portion 20 or the
6 rubber foot 23?

7 A Again, this is beside the point because
8 if you look at the cross-section of this, if
9 you look at the end view, if you turn your
10 view 90 degrees, you see the rubber piece 23
11 as a point or as a little dot but you see the
12 same diameter 20. So if you change your --
13 so this is only on a very single line or
14 plane but the stir stick or whatever of
15 number 20 is elongated just like a plunger,
16 so therefore, that's the reason I'm using
17 that.

18 Q Do you know what my last question was?

19 A Yeah. Which one is closer to the
20 blade. I'm saying that even if this is
21 closer to the blade or more closer, it's
22 irrelevant.

23 Q You would agree with me that the rubber
24 foot at the distal end, 23, is closer and
25 more adjacent to and above the rotating

1 MR. AYCOCK: Objection.

2 Asked and answered.

3 A The answer is no. Yeah.

4 Q Is there any way that the Wayne -- take
5 a look at figure 3.

6 A I'm looking at it.

7 Q Do you agree that the auger component
8 43 acts as a nut to connect the blade
9 assembly to that screw component 30?

10 A That is what is depicted here, yes.

11 Q So in other words, without the auger
12 component 43, the blades would not stay on
13 that blade assembly during operation; is that
14 accurate?

15 A That's accurate unless you use a
16 regular nut, yes, so what Wayne has done, he
17 has extended the nut vertically up and
18 expanded it as an auger.

19 Q What does -- do you know what Wayne
20 teaches with respect to the helical portion
21 of the auger component? What's the purpose
22 of that?

23 A Basically he's trying to create a
24 positive pumping flow downward toward the
25 blade and therefore, that's why I am

1 asserting that these diameters are going to
2 match the '021 patent in terms of cross-
3 section because unless the auger diameter is
4 large enough to contact a given air channel,
5 it's not going to work and I'm sure the
6 inventor of a device has thought of that
7 already. So according to Wayne, the damage
8 of the air channel was about this and the air
9 channel is defined by the defining member so
10 A equal to B, B equal to C, therefore, A's
11 equal to B.

12 Q You would agree that in operation, the
13 cutting blades of the helical member rotate
14 at the same angular velocity as disclosed in
15 Wayne?

16 A Absolutely. Absolutely.

17 Q It's the shape of the helix plus the
18 angular velocity of the auger component in
19 Wayne that Wayne believes prevents the
20 formation of air pockets?

21 MR. AYCOCK: Objection.

22 Vague, ambiguous.

23 Q You can answer.

24 A I mean, you have this rigidly attached
25 to the rotating shaft. It is very obvious

1 If I am a person of ordinary skill in the art
2 of blender design, I keep going back to the
3 need. I look at a blender without any device
4 in it and I see that an air channel is
5 generated and then something dawns on me that
6 if I have something in there, I occupy the
7 space, and then I look at the Wayne patent
8 and it says somebody has put something in
9 there already, and actually, I don't want to
10 even to have the rotational portion of it so
11 all I do is to have the mirror image of it
12 and hang it from the top. So that's how an
13 ordinary skill would come up with that.

14 - - - - -

15 (Plaintiff's Exhibit 112 was
16 marked for identification.)

17 - - - - -

18 Q Dr. Rashidi, I'm going to hand to you
19 what's been marked as Plaintiff's Exhibit
20 112. It's the Harris patent, patent number
21 3,346,029.

22 A Uh-huh.

23 Q Take a look at figure 1. Is it your
24 opinion that the spatula 10, the bottom of it
25 approximates the member associated with the

1 blades?

2 A Actually it's larger than the hub
3 portion of the blade so --

4 Q So it does not approximate?

5 A It does not approximate, but if the
6 allegation of '021 patent is correct, this is
7 supposed to work even better than Vita-Mix.

8 Q How would this work better if this --
9 see the large spatula portion 15 there, sir?

10 A Yeah. I was going to explain that.

11 Q Go ahead. Explain that.

12 A Because the name of the game is to
13 occupy space and actually this is what Vita-
14 Mix has done, to make the plunger much larger
15 in diameter compared to the wooden stick so
16 that it occupies a space. So if '021 -- if
17 Vita-Mix is alleging the little disk at the
18 bottom of the Back To Basics as approximating
19 the size, if you make that size bigger it's
20 even better. Here --

21 Q Can you draw by arrows --

22 A I'll use this one.

23 Q Yeah.

24 Can you draw by arrows a flow diagram
25 of how the fluids or liquids would flow in

1 of getting an ice cube you can get a cup of
2 slush from your refrigerator and when you put
3 it in there, when you tilt it, you can go on
4 the left side of the conical upside-down
5 shape and it can get there and if you just
6 wiggle it, you can transfer the ice slush
7 from top to bottom.

8 Q Wouldn't you agree with me that this
9 spatula having this peripheral edge 15 would
10 actually prohibit some mixing during
11 operation?

12 A I really cannot. This is one of those
13 things that we have to test. This can be one
14 of the best designs. I don't know. I don't
15 know. I cannot answer that.

16 Q Do you know what I'm asking by that
17 question, though?

18 A I absolutely understand but what I'm
19 saying is I am using a simple logic of
20 inventors of Vita-Mix '021 patent. They say
21 we need something to occupy the space and
22 this is the largest occupation you can find.
23 Even bigger. In other words, if you go and
24 interview the Vita-Mix patents, the larger
25 you make the plunger, the better the,

1 supposedly, solution is going to be. There
2 is no harm in increasing the diameter of the
3 plunger. The reason they don't increase it
4 to the absolute limit is because they still
5 need some room for material to be there.

6 So if the logic of '021 patent is
7 correct, the best thing is to have a plunger
8 which is three inches in diameter but there
9 is no room for material anymore so they have
10 found a happy medium of an optimum --
11 supposedly, somehow they attach it to the
12 associated to the blade member and so forth.
13 Therefore, based on that argument, I'm saying
14 that yes, here, you have something which
15 works very well.

16 Q Is it your opinion that a person of
17 ordinary skill in the art would have to
18 change the design in Wayne to practice the
19 method set forth in claim one of the '021
20 patent?

21 A To change the design? What do you mean
22 by that?

23 Q Does a person of ordinary skill in the
24 art have to change the design in Wayne to
25 practice the method set forth in claim one of